

ICF CONSULTING

HEARING ON THE CRITICAL USE EXEMPTION

PROPOSED RULEMAKING

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P R O C E E D I N G S

MS. FINMAN: I would like to thank everybody for attending today's hearing on the proposed rulemaking for the critical use exemption, Docket No. OAR-2003-0230. The purpose of today's hearing is to allow interested parties to provide comments verbally to the Agency. These comments will be considered by EPA as we put together the final rulemaking in the same manner in which we would consider written comments submitted to the Agency.

EPA is happy to answer clarifying questions off-line, and those of you who have such questions should feel free to contact me after the hearing. My phone number is 202-343-9246. The purpose of today's hearing is not to answer individual questions, and I ask you to refrain in this forum from posing such questions. Thank you.

The following individuals have identified themselves as speakers: James Nicol, Mitch Dubensky, Dan Legard, Daren Gee, Steve Godbehere, and David Doniger.

Is there anybody else who would wish to speak whose name I have not mentioned?

[No response.]

MS. FINMAN: Speakers should identify themselves and the organization on whose behalf they are presenting comments. Please make sure to spell out any difficult names when you approach the microphone, and please make sure to read your comments clearly into the microphone. Today's hearing is being transcribed by a court reporter, and the contents of today's meeting will be available on EPA's website in about a week's time.

This list of speakers is in no particular order. Would James Nicol please approach the microphone?

MR. NICOL: Good afternoon. My name is James Nicol, and I represent Great Lakes Chemical Corporation, the sole U.S. producer of methyl bromide. I have studied the proposed rule on the Process for Exemption of Critical Uses from the Phaseout of Methyl Bromide and offer the following comments:

As the sole producer of methyl bromide in the U.S., Great Lakes has a responsibility to help establish a process that efficiently delivers methyl bromide to those entities with an approved critical need, while at the same time ensuring U.S. compliance with its treaty obligations. From its vantage point, Great Lakes has, arguably, the best

overview of the methyl bromide supply chain and, as such, feels strongly that the following four elements are essential to maximize the chances for success of the critical use exemption process.

First, it is essential that Critical Use Allowances are allocated to producers and importers.

We support EPA's proposal to distribute CUAs to current producers and importers on a pro rata basis based on their 1991 baseline consumption allowances.

Distribution of CUAs to producers and importers pro-rated to 1991 baseline consumption allowances is consistent with the method of allocation already in place and has worked well with the distribution and packaging network for methyl bromide. Both the current method and the proposed method allow for trading of allowances to accommodate changes in market needs. Use of consumption allowances rather than production allowances is also the correct approach since consumption allowances are a very close approximation of the amount of methyl bromide sold for use in the United States.

The second key element for a successful CUE process is that critical use exemptions must be granted as a lump sum.

In its draft rule, EPA proposes that CUEs be allocated on a "sector-specific" basis. It is Great Lakes' firm belief that a sector-specific allocation would add unnecessary complexity to the process. We believe that a lump sum approach, which was discussed in the EPA's draft rule, will achieve the required objectives while being much simpler to administer for both stakeholders and the Agency and will increase flexibility while still restricting total production to the levels agreed to by the parties.

The third element that is essential to an effective CUE process is that it must employ a simple, QPS-like self-certification system for monitoring and control.

The record keeping and reporting system proposed by EPA is very similar to the system that has been successfully used in reporting quarantine and preshipment uses of methyl bromide for the past few years. The system relies on periodic reports by producers and distributors and the keeping of specified records by applicators and owners. Self-certification of qualifying uses, with significant

penalties for noncompliance, is used. We support the system proposed by EPA because of its proven success, its simplicity, and the acceptable administrative burden for both stakeholders and the Agency.

Finally, to maximize the probability of a successful process, it is essential that use of existing stocks is not restricted.

EPA has proposed that existing stocks may only be used to fill the gap between CUAs and the total critical uses approved by the parties, or for uses where no application for critical use exemptions was made. This is an unreasonable restriction given that the stocks were either legitimately produced or imported by expending production and consumption allowances or were in existence prior to the initiation of controls in 1994. Most importantly, restricting the use of existing stocks removes essential flexibility from the supply chain, reducing industry's ability to manage a smooth and successful transition to the new CUE process.

In summary, Great Lakes Chemical Corporation, while supporting EPA's CUE proposals in many areas, is concerned that in other areas the proposal remains

unnecessarily complex and overly restrictive. If the process is to be implemented quickly and smoothly, understood and accepted by stakeholders, and administered easily and economically, it must be built upon those key essential elements: critical use allowances must be allocated to producers and importers; critical use exemptions must be granted as a lump sum; a simple, QPS-like self-certification system must be used to monitor and control the process; and use of existing stocks should not be restricted.

Thank you for the opportunity to comment this afternoon. Great Lakes will provide an expanded version of these comments prior to the close of the comment period.

Thank you.

MS. FINMAN: Thank you for your comments, Mr. Nicol.

I'd like to ask Mitch Dubensky to please approach the microphone.

MR. DUBENSKY: Good afternoon. My name is Mitch Dubensky. It's easy for me to spell, but I'll spell it for the record: D-u-b-e-n-s-k-y. I'm Director of Forest Environment for the American Forest & Paper Association,

which is a national trade association of the forest products industry. My remarks will be brief. We will submit information for the record prior to the close of the comment period, but I just wanted to take a few minutes to emphasize a couple areas.

As everybody know, methyl bromide is used in seedling nurseries in order to protect against--

MS. FINMAN: I'm sorry. Could you speak closer to the microphone? I think some people are having trouble.

MR. DUBENSKY: Sorry. Methyl bromide is critical for use in seedling nurseries, and it's for the successful planting and regeneration of forests, and then it's used in order to out-plant into the landscape in order to ensure that our forests do survive and the seedlings do compete. It's used as a soil fumigant in order to prevent nematodes and insect and disease, and, again, it's an important use for planting of trees out in the landscape.

In the meanwhile, while there has been a lot of investment made by USDA and companies in trying to find technically feasible and economically achievable alternatives, again, it's important to recognize, as we sort of investigate those options, methyl bromide becomes a real

critical use to the forest products industry, not only for the industry but for state agencies and state nurseries and smaller nurseries that use methyl bromide.

Just turning more directly to the EPA proposal, we just have the following comments:

Of the four or five options that were proposed, we would support the sector-specific allocation process for a couple of reasons. We think it's fair in terms of the approach because it rewards the sectors and the individuals who played by the rules and submitted and gathered data and information and submitted it to EPA, and it was an apparently rigorous and lengthy process. And we think by the companies having done that and the nurseries and others having done that, it rewards them for having followed the procedures and the process.

Also, what it allows for is group trading to correct any supply-demand shifts within the sector.

Then, finally, I think that it also fulfills the Montreal TEAP Report which talks about endeavoring to allocate according to the principle that they outlined of assigning it to the sector. So we think that there is some consistency there.

There are a couple caveats, just in terms of some further clarification about the new users and whether new users can enter into groups who are not currently part of the existing group to have methyl bromide allocated, and if they become members of a consortium or another group, then obviously the amount of methyl bromide allocated to those people who participated in the process up front winds up getting less, potentially. So there might be some need to review that.

And then, finally, distribution of the allowance to the producers and importers using the 1991 baseline seems to make sense, although a lot of years have transpired since then. So maybe if EPA does collect more information and gathers more data that's more current, it might be useful to sort of--as the future CUEs go through, it might be more reasonable to look at a more current system.

Finally, just more specifically for seedling nursery allocation, under the TEAP there was a total of 192,000 kilograms that was endeavored to be allocated to the seedling nursery, and then in the proposal it talks about 156,000 kilograms allocated to the sector. And there's this 36,000-kilogram shortfall. I understand that some of it's

related to availability of stocks, but yet that's about a 19-percent reduction in availability compared to the 192,000. And that is significantly more--that 19 percent is significantly more than, I believe, the 5- to 9-percent stocks that would make up the total consumption and production for the U.S. So we were just curious how the 19 percent--we're not asking for a reply, but there is a difference between the 19 percent and 5 to 9 percent.

But I'd just like to sum up by saying that AF&PA and other allied groups in the forestry and nursery business would support a sector-specific allocation.

MS. FINMAN: Thank you.

I'd like to ask Dan Legard to come up.

MR. LEGARD: Thank you. I have copies of this I will give you after.

My name is Dan Legard. I'm the Director of Research and Education for the California Strawberry Commission. The California Strawberry Commission appreciates this opportunity to provide an initial comment on the subject proposal on allocation of methyl bromide

rules. The California Strawberry Commission was established under California law and represents all the 600-plus growers, shippers, and processors of strawberries in California. California produced 88 percent of the nation's strawberries in 2003 with a farm-gate value of \$1.1 billion.

The Commission will provide additional written comments on the proposed rule prior to the close of the comment period. The proposal, which occupies almost 36 pages of the Federal Register, raises a host of questions and issues that the Commission is currently considering. However, there are several matters in particular that the Commission believes should be raised at this time. The areas we will discuss at this time are: one, the amount of methyl bromide that will be made available to California strawberry fruit growers; two, the manner that methyl bromide is allocated to different sectors and regions; the requirement of individual growers to certify that they have limiting critical conditions; and, finally, the availability and use of methyl bromide from existing stockpiles.

The Commission is especially concerned about the amount of methyl bromide that may be available to California strawberry growers for 2005 under the critical use

exemption. We ask that the Agency revise the proposed rule to include the full amount of methyl bromide that MBTOC/TEAP recommended in June 2004. At the March 2004 Extraordinary Meeting of the Parties in Montreal, the parties provided the U.S. with sufficient flexibility to increase the amount of methyl bromide allocated to address this upward revision by MBTOC/TEAP of the California strawberry fruit allocation.

As the Agency is aware, the original amount of methyl bromide nominated by the United States to the Parties to the Montreal Protocol was reduced by the parties based on the recommendations of TEAP. The United States, with the support of the Commission, advised the parties that such adjustment was in error and requested adjustments that would essentially restore the amount of methyl bromide originally requested by the United States for uses on strawberries. The United States request and MBTOC/TEAP recommendation will be reviewed by the parties at the November 2004 meetings.

The Commission wants the Agency to make certain that all amounts of methyl bromide that potentially could be made available by the Parties to the Montreal Protocol for use in 2005 under a CUE should be considered in the subject rulemaking.

The United States made a supplemental request that the 2005 critical use exempt level for California strawberries be increased to 1,542 metric tons. The TEAP, in a June 2004 report, recommended that the parties raise the 2005 level for California strawberry fruit field use to 1,443 metric tons. It is anticipated that the parties at their Sixteenth Meeting will endorse the revised California strawberry recommendation made by the TEAP.

For reasons that are not clear, the current rulemaking proposal document does not discuss the potential that the parties will increase the CUE level for 2005 California strawberry field use in November 2004. We do not know why this potential increase was not mentioned. The Agency could simply have made note of the TEAP recommendation on the supplemental request. The Commission strongly urges the EPA to rectify this error by issuing a short amendment to the notice of proposed rulemaking and publishing it in the Federal Register in late September or early October 2004. Further, if the TEAP recommendation is adopted by the parties at the Prague meeting, the Commission strongly urges that the final rule be written to account for

the increased California strawberry critical use exemption level.

The second position that the Commission would like to address relates to the manner that methyl bromide will be allocated among the different sectors and regions. The Commission supports an open market allocation system. This system should be as open as possible with minimal barriers to access by qualified critical users to methyl bromide supplies in both existing stocks and the full amount recommended by MBTOC/TEAP for critical use exemption uses. If such an allocation system is not use or if other aspects of the allocation rule would severely restrict California strawberry growers' access to methyl bromide, then the Commission supports a sector-by-region allocation that would ensure that the full amount of methyl bromide allocated for California strawberry fruit growers is available to them for their critical uses. The Commission urges the Agency to create an allocation rule that is fair, equitable, transparent, and ensures that growers whose methyl bromide uses were identified as critical by MBTOC/TEAP have unfettered access to methyl bromide without the burden of an unnecessarily restrictive and complicated allocation rule.

The third issue that the Commission would like to address is the requirement of individual growers to certify that they have a limiting critical condition to quality as an approved critical user. The Commission feels strongly that the Agency's desire to approve critical users contingent upon their having limiting critical conditions is unreasonable, unachievable, and unenforceable. Through the extensive and exhaustive critical use exemption review process conducted by the EPA and the MBTOC and TEAP, the Commission successfully documented that the California strawberry fruit industry had limiting critical conditions. These included known pest and pathogen problems, limited availability of telone due to state-mandated township caps, and additional time to allow the industry to safely transition to methyl bromide. It is difficult to understand how the Agency expects growers to certify that the telone township cap will impact them when the annual use of telone can change dramatically due to unforeseen shifts in acreage of crops that use telone within individual townships.

Documenting the cause and severity of disease and pest problems within fields has always been an inexact art even when performed by professional pest advisors. The

process of accurately identifying many disease and pest problems is often complicated, time-consuming, and often unavailable for growers with limited funds. The Commission urges the Agency to recognize that requiring growers to self-certify that they have a limiting critical condition in situations where those conditions are contingent creates an unacceptable burden that many qualifying growers will be unable to meet.

We further ask that the Agency make revision to allow growers whose sector and region qualified for a critical use exemption be pre-qualified as an approved critical user and remove any requirements for individual California strawberry growers to certify that they have a limiting critical condition. However, if they are required to certify their limiting condition, then the rule must include transitional issues relating to the safe transition of growers from methyl bromide to alternatives as recommended by MBTOC/TEAP in June 2004.

The Commission also asks that the Agency preserve the availability and use of existing methyl bromide stocks for use by regions and sectors that qualified for critical

use exemptions. The stocks were produced in accordance with the methyl bromide phase-out guidelines of the Montreal Protocol, and their availability to sectors with critical use exemptions should be in addition to the critical use exemption approved amount, and not restricted by the allocation limits. Any restriction that limits the use of existing stocks as a component of the critical use exemption allocation amount will result in significant increases in costs to growers above and beyond those already created by the phase-out of methyl bromide.

In conclusion, we urge the Agency to act favorably and swiftly on our suggestions that would allow the final rule in this rulemaking to reflect all the decisions of the parties regarding the 2005 critical use exemption. This would allow all stakeholders to know what the 2005 situation is as of January 1, 2005, and avoid the need for a separate rulemaking that would cause unnecessary confusion and disruption.

Thank you.

MS. FINMAN: Thank you, Mr. Legard.

I'd like to ask Daren Gee to approach the microphone. Thank you.

MR. GEE: Good afternoon. My name is Daren Gee, and I have been a strawberry grower for over 15 years in Santa Maria, California. I have also expanded my operation to the Salinas area this last season. I have been a member of the California Strawberry Commission and have served as Chairman of the Research Committee for that Commission. I am one of the largest growers in California and have worked extensively with the university and USDA scientists on developing alternatives to methyl bromide.

As you are already aware, endemic soil-borne diseases and pests occur in all strawberry-growing regions, and methyl bromide or combinations of methyl bromide and chloropicrin have been key to controlling these problems. You also know that there is no satisfactory product or method that can replace all the uses of methyl bromide for strawberry production.

I support the California Strawberry Commission's position as stated by Dan Legard. It is essential that the EPA create allocation rules for methyl bromide that are fair, easy for growers to understand, and do not create substantial burdens for growers already feeling the impact of increased fumigation costs and regulations.

How methyl bromide will be allocated in 2005 and beyond is critically important to me, my family, and all the strawberry growers in California. I have a firsthand knowledge on the effectiveness of alternative fumigants and the many changes in cultural practices that are needed to safely and effectively apply them. I have used many of these alternatives for several years and have experienced situations where they did not perform as well as methyl bromide, resulting in crop losses.

For these types of situations, the Commission applied for a critical use exemption, CUE, for 2005. Many critical uses identified by the Commission in the 2005 CUE application were approved by the EPA and the MBTOC/TEAP committees. It is important that the EPA recognize that most growers will have difficulty certifying that they have specific limiting critical conditions especially those relating to the telone township caps. Due to the extremely competitive nature of annual strawberry and vegetable production, it will be very difficult for growers to know if and when their township will hit the telone cap. Dow AgroSciences and the Commission have not been able to accurately predict when and where the township cap will hit

due to the constant shift in the number of acres of vegetables and strawberries produced in the different townships.

Documenting pest disease and pest problems can often be difficult or impossible, especially when many growers rotate land with other crops. Methyl bromide is used to prevent severe outbreaks of diseases. Requiring growers to suffer sufficient losses before they qualify to use methyl bromide will result in many growers going out of business. I urge the EPA to revise the allocation of rules such that all strawberry growers in California will be pre-qualified to use methyl bromide in 2005 based on the CUE application produced by the Commission.

I am also a methyl bromide applicator like many other strawberry growers in California. I currently buy methyl bromide from a small supplier and am concerned that in 2005 it may be difficult or impossible for me to obtain methyl bromide. I ask that the EPA create an allocation rule that does not make it more difficult for small private applicators such as myself to acquire methyl bromide in 2005.

I would also like to ask that the EPA ensure that the availability of existing stocks of methyl bromide be ensured in 2005 in addition to the CUE allocation. The prices of methyl bromide have already placed significant financial burdens on strawberry growers even with the availability of these stockpiles. If the EPA creates a rule that reduces or eliminates our access to these stocks, then the price of methyl bromide will increase even more. These stocks were produced following the rules of the Montreal Protocol, and they should remain available for growers who wish to use methyl bromide in 2005.

Thank you for your time.

MS. FINMAN: Thank you, Mr. Gee.

I'd like to ask Steve Godbehere to approach the microphone.

MR. GODBEHERE: I am Steve Godbehere, and I represent Hendrix & Dale. We are a methyl bromide distributor on the East Coast. For the last ten years, Hendrix & Dale engaged in a good-faith program to promote the use of alternatives and substitutes for methyl bromide. We have reduced the dosages of methyl bromide by using improved equipment and

techniques. We have used alternatives such as 1,3-D, chloropicrin, and metam sodium wherever and whenever possible. And we have engaged in an active research program with potential alternatives such as iodomethane. The time, effort, and money expended has been considerable. This program has enabled Hendrix & Dale with the active cooperation of its grower customers to accumulate some inventory for use after the phase-out. Our intent was to aid in the transition to alternatives and minimize disruption by providing methyl bromide to growers who were not able to apply for a CUE because of their size, financial consideration, or lack of a consortium.

We also intended to supply growers who either did not receive a CUE exemption or got a CUE exemption that was, in fact, inadequate to meet their critical needs. Likewise, in the event of unusual circumstances, such as an inordinately large pest population, loss of an alternative or component of an alternative such as the recent loss of pebulate, or disruption of methyl bromide production, there would be material to mitigate the effects on the growers.

Hendrix & Dale adopted this program in good faith and in reliance on the Clean Air Act and the regulations in

existence at the time. It's unfair to penalize Hendrix & Dale for accumulating this inventory by implementing restrictions on the use of stockpiles. It is also unfair to growers. Many helped reduce methyl bromide use in reliance on the unrestricted availability of stockpiles. The growers and Hendrix & Dale will both be penalized for being good stewards of the reduced quantity of methyl bromide if restrictions are placed on the use of our inventories. These stockpiles were accumulated to supplement alternatives and to mitigate any negative effects on their use.

Thank you so much, and Hendrix & Dale plans on submitted additional written comments.

MS. FINMAN: Thank you.

I have one more speaker on the list. That's David Doniger from NRDC. Is there anybody else who wishes to speak?

[No response.]

MS. FINMAN: Okay. Thank you.

MR. DONIGER: Hello. I'm David Doniger from NRDC, Natural Resources Defense Council. I'm glad to be here. I was expecting this to drag on a long time, and--

MS. FINMAN: Could you bring the microphone closer?

MR. DONIGER: So I am not that familiar with what has been said already--or how to fix the mike. There we go. Also, I'm suffering from laryngitis, so bear with me.

I appreciate the opportunity to testify at this hearing on behalf of NRDC's one million members and active supporters. I want to address four issues, and we'll be supplementing these initial comments with further comments later.

First, a couple of comments about the legal framework. It's our view that the proposed rule does not fully and faithfully implement the requirements of the Clean Air Act on the Protocol governing critical use exemptions, and it would allow substantially higher levels of methyl bromide use, production, and consumption in 2005 than the act and the Protocol permit.

Now, the proposed rule does begin by correctly summarizing the relationship between the Clean Air Act and the Protocol provisions in particular, and I won't go through the details, but I agree with the proposition that the Clean Air Act incorporates the Protocol and its

decisions, and that those have to be--the criteria in the Protocol and its provisions need to be carried out in the rulemaking we're in now.

Section 604(d)(6) also creates a domestic procedural requirement beyond the Protocol procedures, namely, to make the exemption decisions through this rulemaking. The rulemaking requirement has two critical implications. First, none of the government's prior factual assertions about critical use needs has any legal status yet through the Clean Air Act. There hasn't been a rulemaking before this, and an opportunity to comment on those assertions, and in some cases the basis for those assertions is still not disclosed. And we haven't had reasoned response to comments yet. That's all happening now.

What this means is that EPA cannot rely on factual assertions made in prior critical use nominations or other documents. These factual assertions need to be proved up now with their supporting data and made available for comment. And that includes the need to disclose all important data, including that which is currently subject to confidentiality claims, so that there can be a reasoned

decision and reasoned explanation of that decision after an opportunity to comment on all that information.

The second key implication of the rulemaking requirement is that the exemption decisions need to be made on the basis of up-to-date information. The rulemaking is taking place now. The EPA can't rely on factual assertions made as long as two or three years ago, without taking into account relevant data that has become available since.

So I think that is evident also in paragraph 5 of the Ex-MOP(?) Decision No. 3, which says that the criteria of Decision IX/6 are to be applied when licensing, permitting, or authorizing methyl bromide, i.e., now, at the time the EPA conducts this domestic rulemaking. If the parties had meant that a country could simply rely on its prior factual assertions in CUE nominations, then language providing for applying the criteria now, when licensing, exemptions would not have been included.

Let me turn to the second issue, critical use quantity. Perhaps the most glaring shortcoming of the proposed rule is that it proposes allowing 8,942 metric tons for critical uses in 2005 without giving any consideration

to whether a lesser amount is supported on the basis of current up-to-date data. That number 8,942 is contained in Annex II of the Ex.-MOP decision, but the decision, especially through paragraph 5, makes clear that this is only an upper limit, a starting point for the domestic decisionmaking. In fact, EPA correctly observed that the consumption and production amount in the decision is an upper limit. There's no similar description of the use amount as an upper limit.

The proposal contains no discussion of what amount of use is appropriately deemed critical pursuant to Decision IX/6 in light of current data on use reductions in recent years.

I'm going to skip several of the legal points which are made in here. You'll have the opportunity to read them, and I brought some copies for others, too.

There is nothing in the proposed rule to address two requirements of Decision IX/6 in paragraph (1)(a) of IX/6: the requirement that lack of availability would result in a significant market disruption, and that there are no technically or economically alternatives or substitutes available now. So, in our view EPA can't make

the finding that that full amount is needed as critical--for critical uses with the data that's available now, and here's the fundamental reason why. The EPA data supplied to NRDC in June under the Freedom of Information Act show that the phase-out of methyl bromide, in 2003 the total use of methyl bromide was already substantially lower than the amount proposed as critical for 2005. In short, methyl bromide use has already been cut well below the level proposed for 2005.

The FOIA data show that in 2003 total U.S. use of methyl bromide--that's consumption plus drawdown of inventory--was already 5 percent below the 8,942 metric ton upper limit. And the data show that there was consumption in 2003 of 6,507 metric tons and a drawdown of 1,167 tons from stock. It bears emphasis that this was the total used in 2003 for all U.S. uses, not just the smaller set of uses that have been deemed critical for 2005.

So in 2003, total use was only 7,674 metric tons, 1,268 tons lower than the upper limit reflected in the proposal. And we ask: How can EPA propose 8,942 metric tons are critical in 2005 when the total used by all farmers, millers, and other users two years earlier was

already 5 percent lower? This data is not discussed in the proposal, and it needs to be.

There are two reasons why the amount for 2005 should be less than the total used in 2003. First, only some uses prevalent in 2003 have been deemed critical. Thus, the amount used in 2003 by the non-critical use category should be subtracted off the top of the 2003 amount.

Second, there has been progress since 2003 in applying alternatives in the critical use categories, and this progress needs to be accounted for with further reductions in the critical use amount.

Let me turn to production and consumption amount. As noted, Annex II of Decision Ex. I/3 sets an upper limit of 7,659 metric tons on U.S. production and consumption for critical uses. This amount is subject to reduction for two reasons. First, it can't exceed the amount of critical uses allowed. So if, as I've been saying, the critical use amount needs to be reduced, then that further reduces the upper limit on production and consumption. And the second reason to reduce the amount for production and consumption is to reflect the amount of methyl bromide stocks. In

contrast to the failure to address paragraph 5 of the Ex-MOP decision with regard to the critical use amount, the proposal does acknowledge that production and consumption must be reduced below the upper limit to account for stocks.

As everyone here knows, NRDC is seeking the stockpile data in EPA's possession for 2002 and 2003 through a FOIA request, and I will not present legal arguments here about why we think the confidentiality claims are not valid. We hope EPA will soon disclose the requested data. It needs to have that data available for comment before the comment period is over, or you're going to have problems, further problems with failure to disclose the basis of the rule. We'll address those issues further in our later comments.

The data, though, that we do have from the FOIA use request that was answered in June show that consumption in 2003 was only 25 percent of the allowed amount, and that it had been lower than the allowed amount in every year prior, for the past six years or so.

At the same time, however, the producers and distributors have accumulated a large stockpile, and for various reasons, which I won't go into here, we have inferred--although we don't know this number, we've inferred

that it is at least 10,000 metric tons or 22 million pounds, which would be an amount equal to 40 percent of the U.S. baseline. We note that EPA has asked for a broader round of updated stocks data in the 114 request.

But today let me briefly touch on several issues posed by the proposed methodology for addressing what existing stocks are available, quote-unquote.

First, NRDC submits that EPA is proposing a false distinction between the terms "existing" and "available." Decision IX/6 in paragraph (1)(b)(ii) states the condition that methyl bromide "is not available in sufficient quality and quantity from existing stocks of banked or recycled methyl bromide, also bearing in mind developing countries' need for methyl bromide." In this language, the only difference between "available" and "existing" is the deduction to reflect developing country needs.

Decision Ex.-MOP I/3, paragraph 5 expressly incorporates all of Decision IX/6, paragraph 1. It also provides that a party's domestic regulatory procedures "take into account available stocks." This formulation only reiterates what is already in Decision

IX/6--"available" equals "existing" minus developing country needs. It does not create a new meaning for "available" that encompasses more deductions than for the developing country needs. Thus, there is no authority for the other proposed deductions from existing stocks in EPA's proposed "available stocks" formula.

Specifically, there is no basis for the catastrophic reserve Factor C. There is no basis for N, a transition amount for users outside of critical use categories. And there is no authority for E2, the amounts held for export to developed countries.

On the merits, we are not aware of any precedent for the proposition that 100 days of inventory of a chemical is needed as a reserve against a hypothetical catastrophic loss of production capacity. There has never been such an event for methyl bromide, and EPA has not provided a basis for believing that such a catastrophe is a reasonable possibility. We will address this further in written comments.

Also, we can see no legal basis for allowing use of stocks by users that did not apply for or did not qualify for critical use status. There is no basis for EPA's

supposition that some users did not apply for critical use status because they were counting on use of stocks. It should be remembered that at the time CUE applications were due, the users did not even know that a sizable inventory existed. Recall that the dearth of information on existing stocks is what led Congressman Barton, at users' urging, to seek stocks information from EPA in 2003. Initial information on the existing stocks became generally available only in response to Congressman Barton's inquiry, which EPA did not answer until February 2004. There is no way that in 2002 the so-called transitional users could have been relying on stocks the existence of which they were ignorant. The fact is that most of them did not see a need to apply. And while some of those so-called transitional users may have applied for CUEs, their applications were rejected either by the U.S. or by the parties as a whole.

The only factor, other than the D factor for reflecting the use of stocks in 2004, that possibly has a basis in the Protocol decisions is E1, and we will comment on that and its relationship to the parties' "basic domestic demand" decisions in our final comments.

We also request that the Agency clarify the definition of so-called "restricted stocks of methyl bromide that were produced for quarantine and preshipment." How does the Agency propose to determine the amount of stocks currently held for that purpose? Does the Agency have information regarding the amount of stocks held for that purpose in '02 and '03?

With regard to the data request currently outstanding for 2004, EPA is asking firms to declare the stocks they hold for the purpose of selling for critical uses. The data request appears to allow firms to self-determine how much of their existing stocks should be dedicated to that purpose or for quarantine and preshipment. And this appears to open a loophole for minimizing the stockpile relatable to critical uses and magnifying next year's production for critical uses by shifting the surplus to a category labeled quarantine and preshipment. Does the Agency intend in this data collection process to compile data on how much inventory is dedicated to quarantine and preshipment? So those are several questions we have, and, of course, we will pursue in the future the current views we have about confidentiality, and we hope that in resolving

the FOIA request that's currently pending, EPA will establish some clear rules that will allow the dissemination of the data collected in this new request.

To finish up, I'll touch briefly on allocation issues.

First, NRDC supports the "universal" approach rather than the use-by-use allocations. The universal approach provides advantages both to users and to environmental organizations. Since use-by-use information on current needs is spotty and information on future needs is even more speculative, there is a risk for users that there will be methyl bromide surpluses in some use categories and shortages in others. For users, the universal approach eliminates this risk, and from the environmental point of view, it allows for a notion of sort of a single, unified reserve to cover the uncertainty about the amounts needed rather than use-by-use stovepipe reserves, which would allow for a smaller total amount of methyl bromide to be classified as needed for critical uses, still having this reserve available to shift around where the market determines it is actually needed and not end up with extra cabined-off reserves.

Second, NRDC strongly opposes allocating allowances to methyl bromide producers and stockpile holders. Instead, we favor allocating allowances to the users, through their associations or other surrogates, with the revenue derived from those allowances dedicated to alternatives research and demonstration. NRDC does not believe it is fair or efficient to structure the regulations so that the producers and stockpile holders have the potential to reap a windfall at users' expense.

Basic economics tell us that if demand remains strong relative to supply, critical use allowances and critical stock allowances will command a substantial value. Producers and stockpile holders will reflect that value in the price of methyl bromide they charge users. The price increase will be the same whether the allowances are granted to the producers and stockpile holders or are granted to the users. What will be different is who gets the revenue associated with the allowances. If the producers get the allowances for free, they will add their resale value to the price of methyl bromide and pocket the windfall.

But if the allowances are given to user associations, the allowances will provide an additional

source of funds for alternatives research and demonstrations. Producers and stock holders will have to purchase the allowances from the user associations, raising revenue, much needed revenue for alternatives research. Methyl bromide prices will be the same in this case. The difference is that the producers and stockpile holders will not receive the unfair windfall at users' expense. Instead, the funding will benefit the users by accelerating the demonstration of feasible alternatives to methyl bromide, and, I might add, that would allow for a quicker completion of the phase-out.

So thank you for the opportunity to present these comments, and we will provide more later.

MS. FINMAN: Thank you.

Are there any other speakers who wish to make comments today? Yes, Mr. Gee?

MR. GEE: I'd like to make just one quick comment. As an individual who has been actively involved in methyl bromide in the State of California over the last 15 years-- actually more than that, more like 20 years. One of the things that has occurred in the State of California with the strawberry growers--and I am most familiar with that area--

is the regulations in California affect alternatives more than the quality of the product itself.

What I'm trying to say is a lot of people have made decisions based on some alternatives not by regulations only, not because the material is a replacement or the material is going to give them the same quality results as they've had in the past. And the more difficult the regulations, the more you have the move, the lower the production.

Right now what we're seeing in California is we have people that have been using alternative products for the last two years and are anxiously trying to get another methyl bromide application on because of the weed and disease pressure that is now upon them.

So I just wanted to get that on the record. Thank you.

MS. FINMAN: Thank you.

Any other comments?

[No response.]

MS. FINMAN: I'd like to thank everybody for attending this hearing, and as I mentioned before, the

transcript of this hearing should be available on our website in about a week's time.

Thank you.

[Whereupon, at 2:05 p.m., the hearing adjourned.]